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80-2112

NO. ___

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

Edwin R. Long, Ralph E. Long,

Petitioners

v.

Jean M. Bonnes, Christopher Camuto, Farmworkers' Legal Project of the American Civil Liberties Union of Virginia, Inc.; Migrant and Seasonal Farmworkers Association, Inc.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Daniel Hartnett,
AYRES, HARTNETT & CUSTIS
Court Green
Accomac, Virginia 23301

June, 1981

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QUESTIONS PRESENTED

The petitioners present the following questions for determination:

1. Where the condition insisted upon by the defendants before litigation is upheld after litigation is instituted by the plaintiffs, do in fact the plaintiffs prevail entitling them to an award of attorney's fees under 42 U.S.C. §1988?

2. Were the petitioners, Ralph and Edwin Long, violators of federal law entitling the respondents to an award of attorney's fees under §1988?

3. Where the findings of a district court were not clearly erroneous, may an appellate court substitute its own conclusions in support of its own abstract proposition?

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OPINION BELOW

The opinion of The United States Court of Appeals for the Fourth Circuit has not yet been reported but is set forth in the Appendix, infra, at page 1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on the 18th day of March, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. § § 1254(1), 2101(c).

STATUTE INVOLVED

The following statute relating to the discretionary award of attorney's fees is involved, 42 U.S.C. §1988, and is set forth in the Appendix, infra. (App. 36).

STATEMENT OF THE CASE

The plaintiffs below and the respondents herein brought an action in the United States District Court for the Eastern District of Virginia alleging that they should be permitted access to a migrant labor camp owned by the petitioners. The petitioners on the other hand claimed that they had always permitted access upon notice without any requirement of permission and the district court so found.

A consent order was entered and the respondents were denied attorney's fees by the United States District Court. An appeal was taken therefrom and the matter was thereafter remanded back to the district court by the court of appeals for the Fourth Circuit for a factual determination as to the entitlement of attorney's fees, Bonnes v. Long, 599 F.2d 1316, (4th Cir. 1979).

The matter came on for hearing on the remand order before the United States District Court for the Eastern District of Virginia, the Honorable Judge J. Calvitt Clarke presiding, and after hearing evidence the court again denied the plaintiffs attorney's fees requested under §1988.

All of the pertinent facts are included in the district court's findings of facts and conclusions of law, which of course are contained in the Appendix now lodged in the Fourth Circuit. Your petitioner requested by motion that the record in the Fourth Circuit be forwarded to this honorable Court, which motion was denied. In the absence of the record being before this Court the district judge's findings of fact and conclusions of law are here set forth as an accurate statement of the case. They are as

follows commencing at page 6 of the Appendix lodged in the Fourth Circuit Court of Appeals:

THE COURT: Gentlemen, while I am going to state my conclusions of law and findings of fact from the bench at this time, I reserve the right, in the event the record is written up, to edit these remarks or to prepare a written memorandum opinion, or both. My purpose in making that reservation is that I am always shocked to read my discourses and find that my sentences have a tendency to ramble and that my grammar is not all that it should be. I will make no substantive changes, but I will try to clean up the act a little bit.

Now, there is no question in the Court's mind, gentlemen, that Congress concluded, from whatever hearings it had on the matter, that there had been some

abuses of migrant labor that were detrimental to the interests of all of the citizens of the United States and that the problem, in their judgment, required federal legislation.

There is no question but what the federal legislation enacted gave the Secretary of Labor a broad brush with which to paint and that the employees, either direct or of independent agencies, acting for the Department of Labor, had broad powers to enter upon the lands of farmers and to consult with farmers' employees and to attempt to take actions which those minions of the Department of Labor felt were in the best interests of those migrant laborers.

I do not detract for a minute, by anything that I say here or have said throughout any of the hearings we have had in this case, from the purpose of

that act.

The Fourth Circuit has reviewed the law pertaining to this case and has given specific instructions to this Court.

I, of course, adopt the Fourth Circuit's findings or conclusions of law as the conclusions of law of this Court in this hearing, and I do not feel that it would be of any value to repeat those now because they are indelibly fixed in the record and in all of our minds.

So what we are really concerned with here is my findings of fact.

The Court does find as a fact the following:

That prior to 1977 there was no restriction in the access which any governmental agency or social service agency had to the Long farm, except that the farm office be given reasonable notice of entry upon the farm land.

The Court also finds that no difficulties similar to those appearing in this case arose at any time before 1977.

Those facts are based upon uncontradicted evidence.

The Court further finds that Miss Bonnes was told in 1977 that she could come upon the land to do her work after first checking in at the farm office.

And I might say that I find that the request to check in at the farm office to be a reasonable request. It was, for most purposes, embodied in the consent order. That requirement certainly would lead to a more orderly operation of the defendants' business -- to know who was on the land and to make sure that there was no conflict between work schedules and those visits.

The Court further finds that Mr. Geraty was advised, in a telephone

conversation with Mr. Ralph Long, that he could come upon the land with due notice. This was in 1977.

The Court further finds that persons, whether connected with the Migrant and Seasonal Farmworkers Association, Incorporated, or the ACLU, or whether connected with some other organization, did go upon the Long land and did request complaints or solicit complaints from the farmworkers and that the soliciting and requesting of those complaints did have a tendency to be disruptive of the labor force.

The Court further finds that one of the admitted aims of the Migrant and Seasonal Farmworkers Association, Incorporated, was to take people from Mr. Blanding's work crew and other work crews, regardless of a person's obligation to Mr. Blanding or Mr. Long, and to place those persons elsewhere, either in other

employment or training, at the expense of the government, if necessary.

The Court has reviewed, incidentally, the Code of Federal Regulations and finds that the Labor Department set this program up in such a manner that the more of the crew members a local outfit was able to proselyte, the more appropriations they got, and that the Code of Federal Regulations further provided for a competitive system among different teams in carrying out such work.

That is the law and I cannot argue with it, but it does set certainly the background which played some part in the misunderstanding which occurred in this case.

The Court finds that Mr. Blanding and other crew leaders had no substantial diminution of labor force prior to the 1977 growing season, and the evidence there is uncontradicted.

The Court further finds that in 1977 Mr. Blanding's crew diminished from approximately thirty in June to approximately fifteen by the first of September, when the problems came to a head in this case, and was reduced to eight or ten by the end of September.

The Court finds that the Longs were threatened with economic loss because of that diminution and that they did in fact, at the end of the 1977 season, suffer an economic loss in that they had to lose a part of their sweet potato crop because they did not have the labor available to harvest that crop.

The Court finds that the cause of such diminution in the labor force of Mr. Blanding is attributable to the manner in which the persons of government and social agencies performed their task.

And all of these are findings of

fact, gentlemen.

The Court also finds as a fact that prior to the beginning of the loss of work crews, there existed no problems about the entry on the land of the Longs by government agency employees or social service agency employees, that is, people doing the same nature of work as the plaintiffs in this case.

The Court also finds that until Mr. Camuto, Miss Bonnes, and the Catholic nun were on the Long farm around September 1, 1977, that there had been no restriction on the entry of the plaintiffs or others similarly engaged to enter upon the defendants' land, except that they give reasonable notice that they were going to do so.

The Court further finds, as Mr. Camuto has testified, that his people had been on the land and had enrolled some of the

laborers on that land during the 1977 season.

The Court also finds that the conversation in Mr. Geraty's office between Mr. Geraty and Mr. Long, with Mr. Blanding and the other gentleman, Mr. Lopez, is subject to two interpretations, and the Court has concluded that both Mr. Long and Mr. Geraty are honest in their views of it or their interpretation of it.

The Court concludes, however, that Mr. Long meant to convey that he insisted people check with him before coming upon the land.

The Court finds, because of the heat of the conversation and, to be frank with you, Mr. Geraty's devotion to his cause and his inexperience, that Mr. Geraty may have received the opposite impression from the conversation.

The Court again reminds all counsel

that at the time of this conversation, Mr. Long was under pressure from Mr. Blanding, who was responsible for furnishing the labor which would harvest the crops in Mr. Long's fields, and that Mr. Long was facing a severe economic problem and that there is excusable reason for his being excited and upset; and that on occasions like that, there is no question but what people make excessive statements, but there is also no question but what attorneys are charged with the knowledge that at times such statements are made without their being thoroughly or completely meant, and that attorneys certainly know that they are to go back a second time and reopen such matters in cooler times.

I make that statement without changing my previous findings of fact that that[sic] I feel that Mr. Long meant to convey that his sole problem was that the people had not

been letting him know when they came upon the land and had been disruptive of his operation, and he did not mean to convey that people, under no circumstances, could come upon his land and perform their duties to the government or their obligations to the migrant farmworkers on the land.

The Court would call the parties' attention to the fact that one of Mr. Camuto's employees was living on the Long farm, and the Court concludes from that that there was no vendetta between the Migrant and Seasonal Farmworkers Association, Incorporated, and the Longs. If there had been, certainly one of their employees would not have been living upon the land.

Now, gentlemen, from the foregoing, I find as a fact that the defendants would have at all times permitted entry upon their farm by the plaintiffs and any of their employees upon reasonable notice,

and it is my conclusion that the parties had a misunderstanding; that they came to court; that their attorneys discussed their problems with this Court; that the Court gave guidance and advice; that the parties availed themselves of that guidance and advice and entered into a consent agreement which resolved their misunderstanding.

The Court feels that the resolution in the consent agreement provided that reasonable notice be given before entry upon the land, except in certain limited circumstances.

That was the crux of the order, and the Court again reiterates that that had been the status quo up until the 1977 season and had been the express policy of the Longs throughout most of the 1977 season, as evidenced clearly by the uncontradicted testimony that Miss Bonnes had been told that she could come upon the land upon reasonable notice and Mr. Camuto's testimony that his

people had been on the land and had enrolled people during that season.

The Court concludes that the consent decree substantially enunciated the practice and conduct of the defendants before the misunderstanding which occurred in two places: one, in Mr. Geraty's office, and one, on or about September 1st, upon the land, when the Catholic nun and Mr. Camuto and Miss Bonnes were on the land.

I have already explained my interpretation of the misunderstanding in Mr. Geraty's office.

I feel that the misunderstanding on the farm land, where the three were present, was brought about by the fact that while Mr. Camuto and, perhaps, Miss Bonnes, although I do not think he is sure of that, did stop by the office, they did not wait for the Longs or seek the Longs out to talk to them. They talked to somebody else in

the office and just said that they were going down on the land, and that that brought about the misunderstanding which may have made the Longs make some statements that may have been excessive. The statements were, however, in fact, the logical solution to the problem, and that is that they have a court order that would spell out what, in effect, had been the Longs' prevailing practice all along.

So, the Court concludes, gentlemen, that the Longs were the prevailing party in this case and, they being the prevailing party in this case, the request of the plaintiffs for the allowance of attorney's fees is denied.

The plaintiffs thereafter appealed. The Fourth Circuit reversed the district court remanding the case for a determination of attorney's fees holding that the plaintiff was the prevailing party with Judge Murnaghan filing a dissenting opinion.

See App.21.

REASONS FOR GRANTING THE WRIT

It is now indisputable that after the decision of Alyeska Pipe Line Service Co. v. Wilderness Society, 421 U.S. 240 (1975) the passage of 42 U.S.C. §1988 vests discretion in the district court for the award of attorney's fees to the prevailing party in any action brought under other sections provided therein.

It is conceded that the action at bar is such an action that would give rise to the district court's discretion to award or not award attorney's fees to the prevailing party.

It is further conceded that a prevailing party is not necessarily a party who obtains a judgment after litigation but may well be a party to a consent decree if the plaintiff achieves a change or benefit or is relieved of a

burden, Bonnes v. Long, 599 F.2d 1316, at F.2d 1319 (4th Cir. 1979).

Such was the law that was controlling when this matter came on for hearing before the Fourth Circuit Court of Appeals resulting in the judgment now sought to be reviewed.

There are many instances of consent decrees in which attorney's fees have been awarded to the plaintiff as prevailing parties where the defendants have alleged that since the decree is one of consent no one has in fact prevailed. It is submitted, however, that in all such cases the plaintiffs have in fact shown a benefit conferred upon them which would not have been so if they had not brought the suit in the first instance. The petitioners herein find no quarrel with such cases.

One can cite Incarcerated Men of

Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974) in support of this proposition. In the case of Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977), the matter was disposed of by a consent order but the defendant admitted that certain lists that it had compiled or composed were unconstitutional.

In the case of Parker v. Matthews, 411 F. Supp. 1059 (aff'd sub. nom., 561 F.2d 320 (D.C. Cir. 1977), H.E.W. after refusing to act finally retracted its position and agreed to a consent order in respect to the payment of certain back pay. Clearly the plaintiffs won although there was a consent order without litigation on the merits.

The reports are legion on such cases and these petitioners find no problem in accepting that the plaintiffs had been the "catalyst" to enforce compliance and were therefore entitled to fees under

§1988.

In the instant case however the Court of Appeals for the Fourth Circuit has dealt very unfairly with the defendants below, Ralph and Edwin Long. After the case has been reduced to its most simple statement the court ruled that mere notice from the plaintiffs to come upon the defendants' land was reasonable by virtue of the character of the operation that was being conducted, and this was precisely the insistence of the defendants prior to the institution of the action.

The opinion filed herein stands for two propositions - the majority by Judges Winter and Phillips taking the position that because the plaintiffs, MSFA and FLP, filed suits they were entitled to attorney's fees under §1988 merely because the district court held that their access to the Long farms was embodied in

a consent order. On the other hand the dissenting judge, Judge Murnaghan, reasoned that the requirement of mere notice which did not include permission was a reasonable requirement and that the Longs had lived in complete compatability with the MSFA and FLP over the years with this very agreeable arrangement. It was this arrangement that the Longs insisted upon prior to litigation and it was the very arrangement that was approved by the court during litigation. As a matter of fact the appellate court thought even in the face of such arrangement that the plaintiffs below had prevailed.

WHO THEN WAS THE PREVAILING PARTY? It is of paramount interest to note that in this Court's decision in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), attorney's fees under §1988 were awarded against "a violator of federal

law", U.S. 418. By no conceivable stretch of any logic were the Longs ever found or shown to be guilty of a violation of federal law. In fact their very behavior was upheld by the district court.

As has been pointed out the Longs could have very easily instituted a suit seeking a declaratory judgment as to whether or not notice should be afforded to them prior to the entry upon the land by the MSFA and FLP. One can only assume that the same court would have ruled in the same manner, i.e., that notice was reasonable and therefore the Longs would have prevailed in that action. Under Christianburg, supra, they themselves would have been entitled to attorney's fees. We are now faced with the bizarre position that the Longs, who did not institute suit but were the named defendants in the suit by the plaintiffs, not

only are deprived of attorney's fees but are now called the losing parties by some odd reasoning of the Fourth Circuit Court of Appeals. They prevailed on the issue of notice and entered into a consent decree embodying the same but suddenly became the losing party.

Who can doubt that some notion of egalitarianism was in fact supporting the majority opinion of the lower court?

Great faith was placed by the majority below in the case of Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34 (2nd Cir. 1978). This appellate opinion has to be read very carefully and in conjunction with the district court's opinion reported at 437 F. Supp. 60 (S.D.N.Y. 1977). Not to put too fine a point upon the matter the majority below without Mid-Hudson would be without authority. However the facts as reported

in the district court's opinion in Mid-Hudson, supra, show there was an absolute denial of entry by the defendants to the federally funded plaintiffs, whose function it was to provide legal counseling to indigent persons in the labor camp. The district court denied legal fees noting that the plaintiffs had prevailed but nonetheless found that the defendants did not evince bad faith, visciousness or callous disregard for the plaintiff's rights. Of course, Christianburg, supra, applied this standard to whether or not a defendant was entitled to legal fees and not the plaintiff. Mid-Hudson, therefore does not stand for any proposition supporting authority for the majority opinion in the case at bar.

If one reads the majority opinion herein and accepts its blythe analysis of Mid-Hudson, the reader is led into the

trap that the Fourth Circuit is agreeing with the Second Circuit. Not so! The Second Circuit's opinion in Mid-Hudson, supra, is clearly correct since there was a concessum that the plaintiff had prevailed but merely a misapplication of the standard of Christianburg, supra, in regard to the burden of attorney's fees. Going further the majority below is stating that you are entitled to attorney's fees if you are the one that brings suit. This is clearly wrong in the face of Christianburg, and is clearly wrong in the face of Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). To let such an opinion stand is not only misleading to those of us who have to seek to divine what the federal courts mean but it encourages - if not demands -that legal fees are a matter of right, which certainly was not the intent of Congress under

§1988.

The court below was surely shifting a burden where it in its own opinion felt it could be more easily borne, that is upon the Longs, who were in the language of the court "owners of a large vegetable farm" - an intolerable reason it is submitted for a decision!

The dissenting judge below, Judge Murnaghan, raised perhaps the most obvious point that no matter how personally disposed the appellate judges are toward a particular view they should not supplant themselves as the triers of facts where the evidence supports the conclusion of the district court and that conclusion is not clearly erroneous.

A preliminary demand for fees in this matter has been $25,000.00!

Respectfully submitted,

EDWIN R. LONG, RALPH E. LONG

By Counsel

AYRES, HARTNETT & CUSTIS

By _____

Court Green
Accomac, Virginia 23301

COUNSEL

CERTIFICATE

I hereby certify that on the 12th day of June, 1981, twelve copies of the Petition for Writ of Certiorari were mailed postage prepaid, to Stephen W. Bricker, Esquire, Bricker & Zerkin, 701 E. Franklin Street, Richmond, Virginia 23219, counsel for Jean M. Bonnes, Christopher Camuto, Farmworkers' Legal Project of the American Civil Liberties Union of Virginia, Inc.; and Migrant and Seasonal Farmworkers Association, Inc. I further certify that all parties required to be served have been served.

_____

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Accomac, Virginia 23301

Counsel for Petitioners

In the

SUPREME COURT OF THE UNITED STATES

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APPENDIX

NOTE: The opinion of the United States Court of Appeals for the Fourth Circuit is set forth in its entirety. It is noted, however, that in the body of the decision MSFA, the initials for Migrant and Seasonal Farmworkers Association, Inc., is variously referred to as MSFA and MFSA. This error is transcribed without comment.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1044

Jean M. Bonnes, Christopher Camuto, Farmworkers' Legal Project of the American Civil Liberties Union of Virginia, Inc., Migrant and Seasonal Farmworkers Association, Inc.,

Appellants,

versus

Edwin R. Long, Ralph E. Long,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge.

Argued November 10, 1980.
Decided March 18, 1981

Before WINTER, PHILLIPS and MURNAGHAN, Circuit Judges.

Stephen W. Bricker (Bricker & Zerkin on brief) for Appellants; Daniel Hartnett (Ayres, Hartnett & Custis on brief) for Appellees.

PHILLIPS, Circuit Judge:

This is an appeal from the district court's decision denying an award of attorney's fees to plaintiffs under 42 U.S.C. § 1988. The district court rendered its decision following an evidentiary hearing on plaintiffs' right to attorney's fees that was mandated by our earlier remand of this case. See Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979). Finding that the conclusions that the district court drew from its findings of fact made on the basis of that hearing are erroneous, we reverse its order denying the award and remand with directions to award an appropriate amount to be determined by the court.

I

Because decisions on the award of attorney's fees are peculiarly dependent upon the facts of each case, a brief

review of the litigation that led to this appeal is appropriate. The plaintiffs - the Migrant and Seasonal Farmworkers Association, Inc. (MFSA), the Farmworkers' Legal Project of the American Civil Liberties Union of Virginia, Inc. (FLP) and an employee of each organization - brought suit against the defendants - father and son owners of a large vegetable farm on the Eastern Shore of Virginia - in the United States District Court for the Eastern District of Virginia. In this suit under 42 U.S.C. § 1983, the plaintiffs sought $5,000 in compensatory damages and $10,000 in punitive damages from the defendants, as well as injunctive relief. They alleged that the defendants had denied the plaintiffs access to migrant workers, conspired to deprive the migrant workers of their constitutional and statutory rights, caused irreparable

harm to the migrant workers and prevented free association and expression of views.

As the result of a hearing on a motion for a temporary restraining order and preliminary injunction, the district court entered a consent order. This order provided that the defendants were to refrain from hindering or interfering in any manner with plaintiffs' access for any lawful purpose to the migrant labor camps located on defendants' land; the MSFA was to provide reasonable notice to defendants, except in emergency situations, before entering upon defendants' land for the purpose of providing its services to migrant workers; the FLP was to provide reasonable notice to defendants before entering upon defendants' land for the purpose of conveying general information concerning available legal services, but no such notice was required

when the FLP was responding to specific requests for assistance, when responding to specific complaints, or when entering for the purpose of interviewing actual or potential witnesses or clients. No evidence concerning the facts underlying the dispute was adduced by the court or offered by any of the parties to support this judgment.

The plaintiffs then moved the district court for an award of attorney's fees under 42 U.S.C. § 1988, and this motion was denied. The plaintiffs appealed to this court, and the matter was remanded with intructions for findings of fact on whether plaintiffs were entitled to attorney's fees. See Bonnes v. Long, 599 F.2d 1316.

The evidence adduced at the hearing on remand tended to show that the MSFA is one of the "CETA 303 prime sponsors"

that Congress has authorized to provide, either directly or through purchase-of-services arrangements, manpower services, which include out-reach and intake and assessment, 29 C.F.R. § 97.233(c) (4) (iii) (A) (1) & (2), and supportive services, which include legal services, 29 C.F.R. § 97.233(c) (4) (iii) (C) (12). See 29 U.S.C. § 873. At the time this action was initiated, the MFSA had entered into a purchase-of-services arrangement with the FLP to provide certain legal services to the migrant and seasonal farmworkers in Accomack and Northampton Counties, Virginia. One of the objectives of the MFSA was admittedly to draw migrant farmworkers out of the fields and into vocational training programs that would open up new occupations to these workers, and the MFSA's funding was in part based on the number of farmworkers that they

could interest in these programs. The legal services that were to be provided by the FLP were limited to representing farmworkers in cases involving significant farmworker issues and to providing information and education to farmworkers concerning their legal rights. They were not, for example, to represent farmworkers in ordinary criminal cases.

Because virtually all the migrant farmworkers on the Eastern Shore of Virginia reside during the harvest season in labor camps located on farmers' property, both the MSFA and the FLP found it necessary, in order to provide their social and legal services, to visit the farmworkers at the labor camps when the farmworkers were not working. The plaintiffs admitted that prior to 1977 they had never been denied access to defendants' farm for the purpose of communicating

with migrant farmworkers. In late August and early September 1977, however, the plaintiffs contended that the defendants totally denied the plaintiffs access to their farm.

On August 31, 1977, defendant Ralph Long (the father) visited the FLP office and had a brief discussion with C. Cooper Geraty, supervising attorney of the FLP, concerning the access of FLP employees to the migrant farmworkers residing in the labor camps on defendants' farm. The evidence concerning the content of this discussion is in conflict. Geraty testified that defendant Long categorically refused to allow employees of the FLP to enter upon his property to speak to the farmworkers. Defendant Long, on the other hand, testified that he stated that the FLP employees would be allowed to enter upon his land following the provision of

notice. Although crew leader Blanding and farmworker Lopez were also present at this meeting, Blanding was inexplicitly not called to testify at the hearing on attorney's fees and Lopez, who did testify at the hearing, was not questioned about this incident.

On September 1, 1977, ostensibly in response to requests for services from farmworkers, Chris Camuto of the MFSA and Jean Bonnes of the FLP went to the Long farm. They checked in at the office at the entrance to the farm and, finding that neither of the Longs was present in the office, left word they were proceeding to one of the labor camps. Arriving at the labor camp, they found already present a Catholic nun who was a representative of an organization that provided health services to the migrant farmworkers.

Camuto and Bonnes had been about

their tasks a short time when crew leader Blanding and the Longs, father and son, arrived. A heated discussion ensued in which Camuto, Bonnes and the nun were questioned about the reason for their presence on the Long farm and in which Camuto and Bonnes were accused by the Longs of encouraging the farmworkers to file complaints about their working conditions and generally disrupting their work.

Camuto testified that the elder Long then ordered Camuto and Bonnes off the farm and told them they would be arrested for trepassing if they returned without a court order. Although the Longs contended that they first told Camuto and Bonnes that they were only upset about the two coming on the property without first notifying the Longs personally, both the Longs admitted that the elder

Long had categorically ordered Camuto and Bonnes off the Long property and told them not to come back without a court order. Suit was filed against the Longs within four or five days after this incident.

Based on substantially the foregoing evidence, the district court made its findings of fact. Specifically, the district court found that prior to 1977 the Longs had told the MSFA and FLP that their workers could come on the Long property if they first checked in at the farm office. The court further found that this request was a reasonable one.

The court then found that one of the admitted aims of the MSFA was to take migrant farmworkers out of the fields and put them in other employment, and that funding for the organization was based on the number of farmworkers that they so converted. The court also found

that the MSFA and the FLP were soliciting complaints from the farmworkers and that this activity did have a tendency to be disruptive of the work force. The court also noted that the activities of the MFSA and the FLP had resulted in a reduction of Blanding's crew from approximately thirty farmworkers in June to approximately eight workers by the end of September and that this diminution in labor did threaten the Longs with a substantial economic loss, which in fact was realized when the Longs were unable to harvest all their sweet potato crop in 1977.

The court, therefore, found that Mr. Long was understandably upset when he spoke with Geraty on August 31, 1977 and that as a result he may have made excessive statements about the access of the FLP to his farm that he did not really mean. The court also found that Geraty's

youthful zeal for his cause may have colored his perception of the conversation.

With respect to the September 1, 1977 confrontation, the district court found that the Longs may have made excessive statements because Camuto and Bonnes did not wait at the farm office for the Longs or seek out the Longs to talk with them. These statements, however, were found to be "the logical solution to the problem, and that is that they have a court order that would spell out what, in effect, had been the Longs' prevailing practice all along."

The court ultimately found that the defendants' "prevailing practice all along" was to permit access after reasonable notice. Because the consent judgment, therefore, had done little more than incorporate the status quo in a court order, the court concluded that the

defendants were the prevailing parties and that, therefore, plaintiffs were not entitled to attorney's fees under 42 U.S.C. § 1988.

II

In our previous remand of this case to the district court for findings of fact, we suggested that the district court focus on "the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may turn to whether as a quite practical matter the outcome ... is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition." Bonnes v. Long , 599 F.2d at 1319; see

F. & M. Schaefer Corp. v. C. Schmidt & Sons Inc., 476 F. Supp. 203, 206 (S.D.N.Y.), aff'd, 597 F.2d 814 (2d Cir.1979) (district court, citing Bonnes, stated that appropriate benchmark in determining prevailing party was situation immediately prior to suit). To determine the benchmark condition in the present case, the district court was required to conduct a hearing to determine what was said at the August 31 and September 1 confrontations between the parties.

The district court's findings of fact with respect to these incidents cannot be upset, of course, except upon a finding that they were clearly erroneous. Even if we accept those findings as correct, however, we believe that it was error for the district court to conclude that the plaintiffs' institution of suit in this case did not result in the "actual conferral

of benefit."

At the very least, the consent order entered by the district court remedied the state of uncertainty that the plaintiffs had been forced to go to court to resolve. All the witnesses to the September 1, 1977 incident, including both the Longs, testified that the elder Long told plaintiffs Camuto and Bonnes not to return to the Long property without a court order. Having put the plantiffs to the time and expense of litigation in order to clarify their rights, the Longs cannot now be heard to complain about bearing the cost of that measure, even if, as the district court concluded, the court order did nothing more than "spell out what, in effect, had been the Longs' prevailing practice all along."

Moreover, we believe that this latter conclusion by the district court was in

error. The district court found that prior to suit the plaintiffs were permitted to enter on defendants' property only on the giving of reasonable notice. Under the consent judgment, however, the MFSA was permitted to come on defendants' property without notice in emergency situations, and the FLP was given the same unfettered access when responding to specific complaints or when entering for the purpose of interviewing actual or potential witnesses or clients. While the MFSA's increased right to access might be regarded as a de minimis deviation from the status quo, the unconditioned access afforded the FLP by the consent judgment would presumably cover the majority of its visits to the Long farm, including, for example, the visit that led to the September 1 confrontation.

In the opinion remanding this case

after the original appeal, this court noted that "[a] plaintiff need not prevail on all issues if a significant one is resolved so as to achieve some of the benefits sought through the litigation." Bonnes v. Long, 599 F.2d at 1318. The FLP's unconditioned access to the Long farm in a variety of circumstances certainly seems to fall within this category. It was error, therefore, for the district court to conclude that the plaintiffs were not prevailing parties because the consent order did nothing more than incorporate the Longs' prevailing practice.

Assuming that the plaintiffs were the prevailing parties, the question remains whether there were any "special circumstances" in the instant case on which the district court might have based a denial of attorney's fees to the plaintiffs. See Newman v. Piggie Park

Enterprises, Inc., 390 U.S. 400 (1968) (per curiam). Although the activities of the MFSA and the FLP might have made the conduct of the Longs "understandable," they could not have been considered against those organizations as "special circumstances" justifying the denial of attorney's fees inasmuch as those activities were authorized under federal law. See 29 U.S.C. § 873; 29 C.F.R. § 97.233(c)(4)(iii)(a)(1) & (2); id. (c)(12).

In addition, even the belligerent and intentionally provocative statements of a worker who, like the MFSA and FLP employees, was attempting to provide service to migrant farmworkers residing in labor camps on private property was found in Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261 (S.D.N.Y. 1978) (Mid-Hudson IV), not to constitute "special circumstances" sufficient to support a denial

of attorney's fees under 42 U.S.C. § 1988. Although the Mid-Hudson IV court regarded as "justifiable" the defendant farm owner's perception of the plaintiff legal services workers as "trouble makers" and "fomentors" of dissatisfaction and unrest," it concluded that that perception did not support the denial of attorney's fees in that case. Mid-Hudson IV, 465 F. Supp. at 264. Given the similarity of the factual settings, we think a similar conclusion is warranted in this case.

Having concluded that the plaintiffs were prevailing parties and that no "special circumstances" existed on which to base a denial of attorney's fees, we reverse and remand for a determination by the district court of the appropriate amount of fees to which the plaintiffs are entitled, including, of course, attorneys' fees for the services of their

attorneys on this appeal.

REVERSED AND REMANDED.

MURNAGHAN, Circuit Judge, dissenting:

The facts are usually paramount; the law is often but their hand-maiden. My dissent should not be viewed as disagreement with what the majority has stated the law to be. It is simply that the district judge read the facts differently; he was not clearly erroneous, and, in my judgment, the substitution of different conclusions from his findings represents an invasion across the line of demarcation between the functions of a trier of fact and those of appellate judges.

The contrversy arose in late August and early September, 1977. Prior to that time, the parties lived, without incident, under a tacit agreement that social workers (the Migrant and Seasonal Farmworkers Associations, Inc.) and providers of legal

services (the Farmworkers' Legal Project of the American Civil Liberties Union of Virginia, Inc.) would have free access to farmworkers living at migrant quarters at the farm of the Longs, provided only that prior notice of the visit was given.[1]

During the 1977 season, visits by the social workers and the providers of legal services occurred without compliance with the prior notice requirement. Often the express purpose, consistent with a Federal program to encourage termination of current employment and retraining for full-time job capability in preference to seasonal crop-picking, was to solicit the farm-workers to leave their employment on the

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1 Notice does not involve a request for or receipt of prior consent to or approval for the visit. The record establishes that only notice was required.

Longs' farm. The September 1, 1977 confrontation grew out of such an effort in the course of an unnotified visit. [2]

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2 Plaintiffs sought to establish that the visit on that date was within the "specific purpose" exception to the notice requirement spelled out in the consent decree, but the District Judge manifestly did not accept that version.

In that connection it serves a useful purpose to review the testimony. First consider that of the MSFA and its employee Camuto. He flatly acknowledged that on the occasion of the September 1, 1977 encounter, his purpose was solicitation:

> CAMUTO: I arrived at the camp and parked the car, got out and started introducing myself to the people that I saw there who were sitting around -- they were not working. They were actually in the camp, sitting in front of their doors -- and gave a brief description of who I was and was there anyone interested in --
>
> There was some ongoing program at the time that we were particularly interested in telling people about. I don't remember exactly what that was.
>
> But the gist of my conversations

The dispute which ripened into a law suit, consequently concerned exclusively

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2 (Cont'd)

with the workers was about whatever that training program happened to be, and a few of them said they weren't interested, and then I started talking to one man who did express an interest and said he did want to be enrolled.

As to the effects of the solicitation his testimony was:

> CAMUTO: As far as I could tell in that office and in managing my program and evaluating what we were doing from our own point of view and from a community point of view, I did not see we were having a negative impact on the labor force, even though it's true, as you pointed out and as has been pointed out, that we were obviously taking people out of the labor force.

Mr. Camuto never suggested that he, on September 1, 1977, went to meet an emergency or with a specific purpose. He was quoted by the elder Long:

> LONG: So I got my pickup and went down there, and there was three, and I says -- I said, "Tell me something. What you are [sic] folks doing here?"

a disagreement over whether the social workers and legal services providers

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> Said, "Well, we're trying to help these people."
>
> I said, "Help them in what respect?"
>
> He says, "Well, we're trying to find out if they're getting paid right, getting proper food, stuff like that, trying to help them."
>
> I said, "That's not the way I understand it. I understand you're down here asking those people to make complaints. Is that so?"
>
> "Yes, that's partially."

Reference to Camuto's affidavit accompanying the verified Complaint further reinforces the conclusion as to the exclusively general solicitation purposes of Camuto:

> I drove to the nearest migrant farmworker dwellings in order to interview the workers to determine their eligibility for the MSFA services in general and to ascertain particular interests that the farm-workers may have in specific MSFA program [sic].

On that testimony, I suggest that there is no foundation for holding

should have given prior notice on the occasion of a general solicitation visit.

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2 (Further Cont'd)

that Camuto or his employer MSFA prevailed. The plaintiffs, with common counsel, made no effort to separate time spent for each party plaintiff. At a minimum, therefore, on the remand which the majority has decided is proper, it should be limited to Bonnes and FLP-ACLU. As to Camuto and MSFA, affirmance is clearly indicated even on the theory advanced by the plaintiffs and accepted by the majority . At no time did Camuto ever suggest that his organization was interested in specific purpose counseling.

Turning to Bonnes and FLP-ACLU there was simply a complete failure of proof. Miss Bonnes was not called as a witness, so it is impossible to determine with certainty her purpose in making the September 1, 1977 visit. Besides Camuto, the only other witness for the plaintiffs was Geraty, the FLP-ACLU lawyer in charge of its office and the superior of Miss Bonnes. He, however, had never been to the Long farm. He never received a request for assistance from anyone at the Long farm. He did testify, without details, that Bonnes went on September 1, 1977 in response to a referral, and Camuto similarly recalled generally that such was her purpose. But the judge was not

They were on the premises without notice. Nothing established that there was ever

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2 (Further Cont'd)

compelled to believe such hearsay and obviously did not. The finding that "the Longs were the prevailing party in this case" establishes that.

Even accepting that a specific purpose to see a particular farmworker or farmworkers motivated Miss Bonnes in making the September 1, 1977 entry upon the Long farm does not alter matters. The verified Complaint, filed under the oath of Miss Bonnes, states that prior to the confrontation with the Longs:

> Upon arriving at the labor camp, Plaintiffs discovered that the farmworkers who requested the legal assistance were not available .

That ended, before any "Get off my land" directions from the Longs, any right of Miss Bonnes to remain there without notice. Moreover, the Complaint spells out that she had thereupon proceeded to general solicitation:

> Plaintiffs did begin an interview of another migrant farmworker requesting MSFA services.

The elder Mr. Long testified about the events of September 1, 1977. He

any actual instance, any case or controversy, where the parties had differences

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2 (Further Cont'd)
indicated that "he" -- who must have been Camuto, since the other two were women -- stated that he was there to solicit, but nothing was said to indicate that Bonnes sought to clarify that she, who came with Camuto, was there for any other purpose. The plaintiffs declined to cross-examine the elder Long at all.

The testimony of the younger Long was that Bonnes had visited the farm only once before September 1, 1977, on a day about the first of July. His testimony was uncontroverted that she then described her purpose as seeking out migrant workers to whom to give financial assistance so that they might leave and seek other employment.

Geraty had testified that:

> GERATY: Bonnes, as the outreach worker, visited virtually every migrant labor camp in the two counties and both on a sort of a systematic basis -- that is, just visiting and providing educational and informational material -- and also in response to requests for assistance.

Certainly, in the uncertain state of the record, the district judge was

over a visit in response to specific requests for assistance or to specific complaints or for the purpose of interviewing actual or potential witnesses or clients.

In that context, which was confined to an unannounced entry on the land of

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2 (Further Cont'd)

entitled to his inference against the plaintiffs, who had the burden of persuasion. The court's finding of fact reads:

> The Court finds that the cause of such diminution in the labor force of Mr. Blanding is attributable to the manner in which the persons of government and social agencies performed their task.
>
> And all of these are findings of fact, gentlemen.

A reading of the record should compel a finding that the Longs were thinking of the visits of Camuto and Bonnes solely in terms of solicitation, and not at all as representing efforts to see a specified individual or individuals for a specific purpose.

the Longs to solicit for a retraining program, the elder Long told the "visitors" to leave and not to return without a court order. One could hardly interpret that evidence as other than a statement by Long that he did not agree to unnotified visits for the purposes of solicitation. In all events, it is a permissible interpretation, and the one the district judge made.

When Long referred to a court order, he showed some appreciation for the fact that recourse to a peaceful manner for settling a dispute is preferable to self-help, and the probable ensuing violence, which could be expected in the confrontation between the Longs, Bonnes, Camuto and the Catholic nun.

The matter came on for hearing on motions for a temporary restraining order and a preliminary injunction, whereupon,

assisted by the court, the parties agreed on the form of a consent decree. It called for reasonable notice before entering, except:

1. in the case of the social wokers, "in emergency situations;" [3] and

2. in the case of the legal services providers, "when responding to specific requests for assistance, when responding to specific complaints or when entering for the purpose of interviewing actual or potential witnesses or clients."

So far as the dispute between the parties was concerned, the Longs therefore won. On the sole occasion where they insisted that the plaintiffs leave the premises, the consent decree upheld

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3 The record is devoid of proof of any emergency situation, on September 1, 1977 or on any other date.

their action, for reasonable notice had not been given. The District Judge motivated by a sensible wish to avoid controversy for the future, and perhaps recognizing that the consent decree would be more palatable if the plaintiffs appeared to "get something," included the exceptions in the consent decree. However, no factual situation had yet arisen creating any dispute in the context of an emergency or of a specific purpose visit. The exceptions were in the nature of prevention, not cure.

As pointed out in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978), construing the essentially identical language of § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k):

> Second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law.

The Longs were not in that category when suit was brought, or, so far as the record is concerned, at any subsequent time. The Supreme Court evidently assumed it was addressing the problem of an actual violator, not a potential violator.

In that posture, I submit that Judge Clarke's factual finding that the defendants, not the plaintiffs, were the prevailing parties, was not clearly erroneous.

An unfortunate factor in all this is the premium Christiansburg appears to place on the status of an applicant for attorney's fees as plaintiff or defendant. The parties, at the end of the September 1, 1977 confrontation, all understood that a resolution by lawsuit was necessary because they were in direct conflict over whether the Longs were entitled to reasonable notice when the purpose of a

visit was solicitation. The Longs could have filed the lawsuit, seeking declaratory relief. I doubt that they would have been given, as plaintiffs, as tender care as the majority has accorded Bonnes, Camuto and the two corporations, one with a focused interest on providing social services, the other directing its attention to provision of legal services.

The point is that the consent decree concerned two factual situations: One real, the other hypothetical. The Longs were the victors in the real case. That made them, as the district court found, the prevailing parties. Alternatively, the nonexistence of any true case or controversy under the supposed possible set of facts on which Bonnes, et al. "won," makes it appropriate to conclude that there were special circumstances authorizing the exercise of discretion by which the

district judge denied the requested award of counsel fees. The case was one for which there was no factual basis, although we may assume that, had there been the essential factual substructure, the statement of the law as to specific or emergency vists would be correct. Cf. Christiansburg, supra, at 420: "... Congress ... wanted to protect defendants from burdensome litigation having no legal or factual basis." (Emphasis added.)

I would affirm.[4]

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4 No one should doubt the need for counseling assistance of migrant farmworkers. One should make every reasonable effort to insure that farmers are not permitted to erect barriers precluding easy access by farmworkers to social and legal services. At the same time, one does not materially enhance the rights of one protagonist by disregarding the rights of another. The district judge made findings, fully supported by the record, that the Longs had not acted improperly. It is not open to us to question those findings, however predisposed we may be, in the abstract, to suspect improper action.

42 U.S.C. §1988:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the

costs.

As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

JEAN M. BONNES,
CHRISTOPHER CAMUTO,
FARMWORKERS' LEGAL PROJECT OF THE
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA,
INC., AND MIGRANT AND SEASONAL FARMWORKERS
ASSOCIATION, INC.

Plaintiffs

vs. Civil Action No. 77-591-N

EDWIN R. LONG,

RALPH E. LONG

Defendants.

ORDER

Upon good cause shown, it is hereby ORDERED:

1. That each Defendant, his agents, servants and employees refrain from in any manner hindering or interfering with Plaintiffs' access for any lawful purpose to the migrant labor camps located on Defendants' land;

2. That Plaintiff Migrant and Seasonal

Farmworkers Association, Inc. provide reasonable notice to Defendants before entering upon Defendants' land for the purpose of providing services to the migrant farmworkers resident thereon; such notice shall not be required in emergency situations;

3. That Farmworkers' Legal Project of the American Civil Liberties Union of Virginia, Inc., provide reasonable notice to Defendants before entering upon Defendants' land for the purpose of conveying general information concerning available legal services and general legal rights; such notice shall not be required when responding to specific requests for assistance, when responding to specific complaints, or when entering for the purpose of interviewing actual or potential witnesses or clients.

Dated at Norfolk, Virginia, this _____ day of _____, 1977.

Enter: 10/12/77 by Clarke

United States District Judge

I ask for this:

C. Cooper Geraty
Counsel of Plaintiffs

Seen: and Consented to:

Daniel Hartnett
Counsel of Defendants